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SUMMARY RECORD OF THE 1558th MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 7 November 1996, at 3 p.m.

Chairman: Mr. AGUILAR URBINA

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The meeting was called to order at 3.15 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (agenda item 4) (continued)

Draft concluding observations on the fourth periodic report of Germany (CCPR/C/84/Add.5)

1. The CHAIRMAN invited the Committee to consider its draft concluding observations on the fourth periodic report of Germany (CCPR/C/84/Add.5) contained in an informal document prepared by Mr. Bhagwati.

Paragraph 2

2. Lord COLVILLE proposed the deletion of the word "high" before the word "quality" in the second line.

Paragraph 3

3. Mr. KRETZMER proposed that the paragraph should be deleted, as he had found the information from non-governmental organizations disappointing.

4. The CHAIRMAN, speaking as a member of the Committee, associated himself with Mr. Kretzmer's observation.

Paragraph 4

5. Ms. EVATT proposed that the word "uniform" before the word "application" in the second line should be deleted. It also might be more appropriate to speak of the "reunification of Germany" rather than of its unification. Moreover, as the positive aspects of reunification surely outweighed the problems it had posed, the paragraph should be matched by a positive statement under section "C".

6. After a discussion in which Mr. EL SHAFEI, Lord COLVILLE, Mr. MAVROMMATIS and the CHAIRMAN took part, Mr. BHAGWATI proposed that a new paragraph should be inserted under "Positive aspects" reading approximately as follows:

> "The Committee appreciates that, despite difficulties, Germany has brought about the application of the Covenant in the territories of the former German Democratic Republic."

Paragraph 5

7. Ms. EVATT said that the paragraph should indicate that Germany had ratified both the First and the Second Optional Protocols to the Covenant.

Paragraph 7

8. After a brief discussion in which Mr. BHAGWATI, Lord COLVILLE and Mr. POCAR took part, the CHAIRMAN suggested the deletion of paragraph 7.

Paragraph 10

9. Mr. KRETZMER said that the Committee had no way of knowing whether the decline in the number of racist acts could be credited to action on the part of the State party.

10. Ms. EVATT proposed that the words "the decline in the number of acts of racism and xenophobic violence" should be replaced by the words "the efforts made by the State party to counter racism and xenophobia".

11. Replying to a general point raised by Ms. MEDINA QUIROGA, the CHAIRMAN agreed that the Government of Germany should be referred to as "the State party" throughout the text.

Paragraph 13

12. Mr. KRETZMER, supported by Ms. EVATT, proposed that, in view of the explanations given by the German delegation, the paragraph should be deleted.

Paragraphs 13 and 14

13. Following a discussion in which Mr. KRETZMER, Mr. BUERGENTHAL, Mr. BHAGWATI, Mr. POCAR, Mr. MAVROMMATIS, Mr. EL-SHAFEI, Mr. PRADO VALLEJO, Lord COLVILLE, and Ms. MEDINA QUIROGA took part, the CHAIRMAN, suggested that paragraphs 13 and 14 should be replaced by a single paragraph reading approximately as follows:

> "The Committee expressed its concern that there exist instances of police ill-treatment of persons including foreigners and particularly members of ethnic minorities and asylum-seekers. The Committee is also concerned that there is no truly independent mechanism for investigating complaints of ill-treatment by the police."

Paragraph 16

14. Ms. EVATT wondered whether the paragraph was still necessary in view of the explanations given by the delegation.

15. Mr. BUERGENTHAL pointed out that the paragraph was the first to refer expressly to anti-Semitism. If it were deleted, anti-Semitism should be mentioned in all other paragraphs referring to racism and xenophobia.

16. Mr. EL-SHAFEI thought that the subject matter of the paragraph was adequately covered by paragraph 15.

17. Mr. BHAGWATI urged the retention of the paragraph, pointing out that the persistence of racism, xenophobia and anti-Semitism had been virtually admitted by the delegation. He agreed that a reference to anti-Semitism should be added to all paragraphs of the draft relating to racism and xenophobia.

18. Paragraph 16 was adopted on that understanding.

Paragraph 17

19. Mr. KRETZMER said that, given the delegation's explanations, he was not persuaded of the existence of any violation of article 27.

20. Mr. BHAGWATI said that the text did not allege any violation, but merely pointed out that the State party's definition of minorities was not in conformity with article 27.

21. Ms. MEDINA QUIROGA said that Germany's restrictive definition was inconsistent not only with article 27, but also with article 2, of the Covenant. She was in favour of retaining the paragraph.

22. Mr. LALLAH also thought that the Committee's concern was justified, especially in the light of its General Comment on article 27.

23. Mr. MAVROMMATIS said that there was no evidence of minorities in Germany being denied their rights under article 27.

24. Mr. KRETZMER said the delegation had assured the Committee that the rights mentioned in article 27 were enjoyed by all minorities. He understood that the only special privileges enjoyed by territorially-based minorities were use of their own language, when dealing with the authorities, and running their own schools. It was a moot point whether such privileges should be extended to all minorities.

25. Mr. PRADO VALLEJO said he had not received a satisfactory answer from the delegation to his inquiry concerning the rights of a minority who did not live in a specific area. He was therefore in favour of retaining the paragraph.

26. Mr. BUERGENTHAL said there was no justification for the statement that the German definition of a minority was not in conformity with article 27. The Committee could draw attention to its conceptual disagreement with Germany but could not imply that the Covenant had been violated.

27. Ms. EVATT said she was reasonably satisfied that Germany was making provision for language teaching and other benefits in the case of minorities that did not fall under the national minority definition. On the other hand, she felt the point should be made that the German definition of a minority was narrower than that in article 27.

28. Mr. LALLAH proposed that the words "and is not in conformity with article 27" in the fourth line of the paragraph should be replaced by "in terms of article 27".

29. Mr. BUERGENTHAL supported that proposal. He proposed inserting the words "persons belonging to" after "applies to" in the second sentence.

Paragraph 18

30. Ms. EVATT suggested that the paragraph should be shortened to read:

> "The Committee regrets that Germany has made a reservation to article 26 of the Covenant excluding the application of the Optional Protocol in cases of discrimination in respect of rights not expressly guaranteed by the Covenant."

31. Mr. BUERGENTHAL said the important point was that Germany had entered its reservation in respect of article 26 at the time of ratification of the Optional Protocol. He was doubtful, in the light of the Committee's General Comment 24, whether that was a legitimate procedure. The European Court of Human Rights had ruled that it was not permissible under the European Convention on Human Rights.

32. Mr. POCAR said that the wording proposed by Ms. Evatt seemed to recognize and legitimize a reservation by Germany to the Covenant itself rather than to procedure under the Optional Protocol. It was preferable to adopt a more restrictive interpretation of the reservation.

33. Mr. BHAGWATI said that the reservation excluded the Committee's competence to entertain communications relating to violations of article 26 of the Covenant.

34. Mr. BUERGENTHAL said that he had just been shocked to read the following sentence in General Comment 24, which contradicted the ruling of the European Court of Human Rights:

> "A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol."

35. Mr. LALLAH said that, in the circumstances, it would be unwise to refer to the General Comment in the concluding observations.

36. Mr. MAVROMMATIS suggested deleting the paragraph and taking it up again with Germany after a thorough review of General Comment 24 in the light of the jurisprudence of the European Court of Human Rights.

37. Mr. LALLAH felt that the Committee should still express regret over Germany's reservation.

38. Mr. BHAGWATI, supported by Mr. PRADO VALLEJO and Mr. POCAR, proposed that the paragraph should read:

> "The Committee regrets that Germany has made a reservation excluding the applicability of the Optional Protocol in cases of discrimination in respect of rights guaranteed under article 26 of the Covenant."

39. Mr. Bhagwati's proposal was adopted.

Paragraph 19

40. Mr. BUERGENTHAL, supported by Mr. ANDO, proposed that the whole of the second sentence should be deleted since he was not sure whether solitary confinement could have serious physical and psychological effects in all cases.

Paragraph 20

41. Mr. KRETZMER, supported by Mr. MAVROMMATIS, proposed that the paragraph should be deleted since it was unclear which article it referred to and it was not for the Committee to prescribe rates of pay for prison work.

Paragraph 21

42. Mr. KRETZMER, supported by Mr. BUERGENTHAL, Mr. ANDO and Mrs. MEDINA QUIROGA, proposed deleting paragraph 21 since the provision referred to did not constitute a violation of the Covenant.

Paragraph 22

43. Mr. KRETZMER said he was inclined to commend the State party for allowing refugees to apply for German nationality sooner than other foreign residents. He proposed that the paragraph should be deleted.

Paragraph 23

44. Mr. KRETZMER said that the activities of certain sects were highly detrimental to public order and in particular to the safety of children. He was not convinced that there had been a violation of the Covenant.

45. Lord COLVILLE said that, while it was certainly desirable to circumscribe the activities of some sects, the warnings and prohibitions referred to in the paragraph might affect other denominations and persuasions that were completely harmless. The discriminatory procedure in question had no basis in legislation and rested solely on executive choice, usually by the Länder authorities, setting a dangerous precedent.

46. Ms. MEDINA QUIROGA said that the requirement to indicate adherence to a particular sect when making an application for employment in the public service was certainly an invasion of privacy and hence contrary to the Covenant.

47. Mr. BUERGENTHAL pointed out that denial of employment on particular grounds could be challenged in the Federal Constitutional Court. However, if membership of a religious sect implied automatic disqualification for employment, it should certainly be mentioned in the concluding observations.

48. Following a discussion in which Mr. ANDO, Mr. KRETZMER and Lord COLVILLE took part, Mr. BUERGENTHAL proposed the following new version of the paragraph:

> "The Committee is concerned that membership of religious sects is in itself considered a disqualifying element for purposes of a position in the public service, which may, in certain circumstances, violate the rights guaranteed in articles 18 and 25."

49. Mr. Buergenthal's proposal was adopted.

Paragraph 24

50. Mr. ANDO, supported by Mr. PRADO VALLEJO, proposed that as paragraph 24 referred to the same subject as paragraph 23, it should be deleted.

Paragraph 26

51. Ms. EVATT, noting that the paragraph would have the Committee expressing concern that persons who had requested asylum could be held in detention at airport premises for more than 19 days, said the Committee was concerned, not just about the detention, but also about the inability of those persons to appeal to a court to secure release.

52. Mr. MAVROMMATIS said he agreed: in examining communications, the Committee had always expressed the view that a short period should be provided for detained persons to have recourse to a court in order to secure their release. The paragraph should be deleted.

53. Lord COLVILLE recalled that the problem in Germany involved asylum-seekers who, fearing their requests would be refused, destroyed their identification papers, obliging the State party to enter into lengthy negotiations with the country of origin to secure new papers. If, during that time, the detained persons were allowed no recourse to a court to seek release, then that was a matter of concern for the Committee.

54. Mr. BHAGWATI said the State party had argued that during the period of 19 days, the individuals could not be said to be in detention, as they had not officially entered the country. It was precisely because they were technically not in detention that they had no remedy, i.e. no recourse to the courts.

55. Mr. PRADO VALLEJO said that Germany was unfortunately not the only country in Europe where such measures were applied. He thought it appropriate that the problem should be mentioned in the Committee's concluding observations.

56. Ms. MEDINA QUIROGA said that the fourth periodic report of Germany was entirely silent on whether individuals detained at airport premises had any possibility of recourse.

57. Ms. EVATT said she was under the impression that any person on German territory could appeal to the courts regarding violations of their rights.

58. Mr. KLEIN confirmed that that was true. Individuals often applied to the Constitutional Court and were authorized by special order to remain at the airport pending further consideration of their case.

59. The CHAIRMAN said that if he heard no objection, he would take it that the Committee wished to delete paragraph 26.

60. It was so decided.

Paragraph 27

61. Mr. PRADO VALLEJO said the paragraph should be deleted, since it dealt with matters that were not within the purview of the Covenant.

62. Mr. BHAGWATI drew attention to article 22 (3) of the Covenant, under which States parties to the ILO Convention of 1948 were reminded not to take any legislative measures that would prejudice the guarantees provided in that Convention; one of those guarantees was the right to strike, accorded to all workers except those providing essential services.

63. Mr. BUERGENTHAL agreed that the ban on strikes by public servants was a problem, but pointed out that in many countries, public servants were deemed to provide essential services, for whom the ILO Convention did not guarantee the right to strike.

64. Mr. KLEIN, responding to a query by Ms. MEDINA QUIROGA, said that under German legislation, only certain special categories of public servants, such as schoolteachers and railway station employees, were prohibited from striking.

65. Mr. MAVROMMATIS suggested that the phrase "are not exercising authority in the name of the State and" be deleted, as it did not seem relevant.

66. Mr. BUERGENTHAL said the paragraph might usefully be reworded as follows: "The Committee is concerned that there is an absolute ban on strikes by public servants which may violate article 22 (3) of the Covenant."

67. Mr. ANDO pointed out that the paragraph referred to a difficult situation that was evolving rapidly in view of the tendency to privatize many public services. Like Mr. Prado Vallejo, he would prefer to delete the entire paragraph, but would not block a consensus in favour of Mr. Buergenthal's proposal.

68. Mr. KRETZMER said that the wording of article 22 (3) of the Covenant did not lend itself to the use of the term "violate" in paragraph 27, since it merely indicated that nothing authorized States parties to the ILO Convention to take certain legislative measures.

69. Mr. POCAR pointed out that it would be more appropriate to refer to a violation of article 22 (1), because the freedom to form trade unions guaranteed therein implied the right to strike.

70. Mr. KLEIN said he did not agree that the right to freedom of association and to form and join trade unions included the right to strike. While members of the armed forces had the right to form trade unions, for example, they did not have the right to strike.

71. Mr. KRETZMER said that his understanding of the right to form trade unions was that it must include the right to strike, otherwise it would be devoid of strength.

72. Mr. BHAGWATI noted that the ILO had consistently interpreted the relevant Convention as guaranteeing the right to strike.

73. Mr. POCAR reminded members that that issue had been discussed at length in connection with communications supported by Mr. MAVROMMATIS, he proposed that the difficulty at hand could perhaps be resolved by referring, not to article 22 (3) or 22 (1), but to article 22 as a whole.

74. The CHAIRMAN said that if he heard no objection, he would take it that the Committee wished to adopt the wording proposed by Mr. Buergenthal, as amended by Mr. Pocar.

75. It was so agreed.

76. Ms. EVATT pointed out that the concluding observations lacked any reference to the fact that at three points in the report of Germany (paras. 151, 161 and 235), the State party stated that it was not providing the Committee with information on certain subjects because such information had already been submitted to another treaty body. She could, if the Committee so desired, draft a paragraph to record the Committee's concern on that subject.

77. It was so agreed.

Paragraph 28

78. Paragraph 28 was deleted.

Paragraph 29

79. Mr. KRETZMER proposed that the second sentence should be deleted, as the Committee's powers did not extend to determining how a country should organize the functions of its police force. In the first sentence, the phrase "an independent body" should be replaced by "independent bodies".

80. Lord COLVILLE said he could endorse those amendments provided that the phrase "throughout the territory of the State party" was appended at the end of the first sentence.

Paragraph 30

81. Mr. KRETZMER suggested that in the final sentence, the word "creating" be replaced by "strengthening".

Paragraphs 31 to 35

82. Paragraphs 31 to 35 were deleted.

Paragraph 36

83. Lord COLVILLE suggested that Mr. Buergenthal and Mr. Bhagwati should redraft paragraph 36 in line with the wording to be used in a similar paragraph that Mr. Buergenthal was to draft.

84. Mr BUERGENTHAL, supported by Mr. ANDO, said that since the Committee had already manifested its concern about the attitude of the Federal and Länder Governments to certain sects, the paragraph might be deleted.

85. Mr. BHAGWATI said it was important to retain a reference to the Committee's concern about the holding of conferences and seminars to sensitize the judiciary against the practices of certain sects. Such activities could only have an adverse effect on the impartiality of judges. He suggested that he and Mr. Buergenthal should redraft the paragraph, as Lord Colville had proposed.

86. It was so agreed.

Paragraph 37

87. Mr. KRETZMER proposed that the word "and", between "precise" and "no", should be replaced by "so that", and the word "should" by "would", and that the final portion of the paragraph, after "expressed by him or her", should be deleted.

Paragraph 38

88. Paragraph 38 was deleted.

89. Lord COLVILLE pointed out that the Committee's suggestions and recommendations had now been reduced to only three paragraphs, which seemed somewhat meagre.

90. Mr. KRETZMER proposed that those three paragraphs should be combined with the previous section, and the title amended to read "Principal subjects of concern, suggestions and recommendations".

91. The Committee's draft concluding observations on the fourth periodic report of Germany, as a whole, with the amendments proposed orally in the meeting, were adopted.

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE COVENANT (agenda item 6) (continued)

Communication No. 538/1993 (CCPR/C/58/R.15 and R.16) (Stewart v. Canada)

92. Mr. KRETZMER introduced document CCPR/C/58/R.16, drawn up by Mr. Buergenthal and himself, which they hoped reflected the views of the

majority within the Committee on the question of violation of article 12 (4) of the Covenant. The document detailed the reasons why Canada could not be regarded as Mr. Stewart's "own" country within the meaning of article 12 (4).

93. He also introduced document CCPR/C/58/R.15, comprising the amendments to paragraph 12.9 of the Committee's draft views (CCPR/C/WG/56/DR/538/1993) proposed during the previous discussion. That paragraph was intended to explain why the Committee could not conclude that there had been arbitrary or unlawful interference, in terms of article 17 of the Covenant, with Mr. Stewart's family relations.

94. Mr. KLEIN said that, as he understood it, the two documents were to form the basis for the Committee's findings on the communication. He agreed with the general thrust, but still had some problems concerning the relationship between article 12 (4) and article 13, and wished to reserve the right to submit an individual opinion on that matter alone.

95. Ms. EVATT said that she, too, would be submitting a separate opinion.

96. The CHAIRMAN, speaking as a member of the Committee, said he reserved the right to associate himself with the separate opinion Ms. Evatt would be submitting, and he understood that Ms. Medina Quiroga also wished to do so.

97. Mr. KRETZMER, supported by Mr. BUERGENTHAL, urged members drawing up separate opinions to do so in the light of the views of the Committee and on the basis of the opinion contained in document CCPR/C/58/R.16, as they might find it dealt with some of the issues which had previously raised objections.

98. Mr. MAVROMMATIS supported the proposed draft drawn up by Mr. Kretzmer and Mr. Buergenthal.

99. The CHAIRMAN said that if there were no objections he would take it that it was the Committee's decision that members would receive the consolidated final view of the Committee and, if they had not submitted dissenting opinions within four weeks, would be considered as having joined that opinion.

100. It was so decided.

Communication No. 550/1993 (Faurisson v. France) (CCPR/C/58/R.14) (continued)

101. Mr. BÁN introduced document CCPR/C/58/R.14, which contained proposals he had drafted to supplement and amend documents CCPR/C/WG/57/DR/550/1993 and Rev.2 on the basis of the discussion conducted in the meeting held on 1 November 1996 (see CCPR/C/SR.1550). At that meeting there had been a general consensus that no violation had taken place. If that consensus held, the proposed amendments could be sent to members for consideration and a final draft adopted at the fifty-ninth session without re-opening discussion on the substance.

102. Ms. EVATT said that, although there had been a general consensus among members, some, herself included, had not been convinced that although not amounting to incitement under article 20 of the Covenant the author's

statements were nevertheless subject to restriction under article 19, paragraph 3 (a). At the 1550th meeting, Mr. Kretzmer had put forward a convincing case, but it had not been reflected in Mr. Bán's draft. She had therefore prepared her own draft, which she would circulate to members.

103. Mr. KLEIN said his recollection was that the Committee had decided that no violation had occurred. In his view, only those members who had participated in that decision should be able to append their individual opinions to it and those who would be joining the Committee as new members at the fifty-ninth session should not take part in any further discussion of the communication at that time. His own reservation about Mr. Bán's draft (CCPR/C/58/R.14) was that it should contain more detail about the Gayssot Act inasmuch as it was the basis for the judgement concerned.

104. Mr. BHAGWATI said that, in the context in which it had been passed, the Act was perfectly valid under article 19, paragraph 3 (a); it was on that basis that he held that no violation had been committed.

105. Mr. KRETZMER said he shared the view expressed by Ms. Evatt. The draft prepared by Mr. Bán (CCPR/C/58/R.14) reflected many of the views that had been expressed in the Committee, but in its present form it might not be clear enough to be understood by people who had not been party to that debate.

106. The Committee had to be quite certain as to the implications which its decision would have for its future jurisprudence regarding freedom of expression. A careful argument had to be made based specifically on that aspect of the Gayssot Act which related to Holocaust denial. To some extent that was done in the draft, but not sufficiently.

107. The importance of the decision was such that haste might not be to the Committee's benefit. Mr. Bán's observation that a final decision might have to be deferred to the fifty-ninth session could turn out to be the solution the Committee had to adopt.

108. The CHAIRMAN said that if the communication were to be discussed further by the Committee at its fifty-ninth session, new members would have to be allowed to take part.

109. Mr. MAVROMMATIS said that, at first reading, Mr. Bán's draft did not seem to reflect sufficiently clearly the fact that, in the light of article 19, paragraph 3, the Gayssot Act, though not consistent with the Covenant, had not resulted in any violation of Mr. Faurisson's rights. That point must be stated more clearly because it was one of the most important decisions the Committee would ever take on freedom of expression, which was after all the quintessence of democracy. It was frightening to contemplate what might happen if authoritarian countries took the Committee's justification of the Gayssot Act as a precedent for their own actions.

110. Mr. KLEIN said he opposed re-opening discussion of the communication. There was confusion between the decision that had already been taken and the legal reasoning for it, which had not yet been completed. In his view there was no question of a new decision being taken at the next session.

111. Mr. LALLAH said he had great sympathy with the view expressed by Mr. Klein, but he could not make a distinction between a decision taken and the legal reasoning for it. The Committee had never proceeded in that manner. Even if a decision had been taken the Committee was, under its rules of procedure, sovereign and could reverse it. The Committee's decision in the current case was one of the most important it would ever have to take, not just in the country concerned but in global terms. It had to be made objectively and on the basis of a clear agreed text, so that if members wished to dissent they knew precisely from what they were dissenting. If it was not possible to reach agreement at the current meeting, the communication should be held over until the next session.

112. Mr. POCAR said that if a decision of the Committee were issued with the date of March 1997, it would be a decision of the new Committee and the new members would have to be involved.

113. Mr. BHAGWATI agreed with the two previous speakers. Merely stating that the Committee had already taken a decision was not sufficient. Unless that decision was issued at the latest by 31 December 1996, it would obviously not be possible to prevent the new Committee reopening the issue. Could not the Committee decide that members should, by 31 December 1996, either agree with the proposed text drawn up by Mr. Bán (CCPR/C/58/R.14) or prepare their own texts but reaching the same conclusion?

114. Mr. LALLAH said that decisions were a result of discussion and could not really be reached by correspondence. The Committee's credibility might be diminished by such a procedure.

The meeting rose at 6.05 p.m.